STATEMENT OF ADA E. DEER, ASSISTANT SECRETARY-INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE ENERGY AND NATURAL RESOURCES SUBCOMMITTEE ON FORESTS AND PUBLIC LAND MANAGEMENT, UNITED STATES SENATE, ON S. 1186, A BILL "TO PROVIDE FOR THE TRANSFER OF OPERATION AND MAINTENANCE OF THE FLATHEAD IRRIGATION AND POWER PROJECT, AND FOR OTHER PURPOSES."

December 13, 1995

Mr. Chairman, and Honorable Members of the Senate Energy and Natural Resources Subcommittee, I am pleased to have an opportunity to testify today on a matter of great concern to the Bureau of Indian Affairs, the Department of Interior, and the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation. The Department strongly opposes S. 1186, which would provide for the wholesale transfer of the operation and maintenance of an Indian irrigation project, to non-Indian irrigators on the Flathead Indian reservation. The Department first became aware of an attempt to transfer operations for this project from the United States to the three irrigation districts on the Flathead Reservation this past summer. At that time, a proposed amendment to H.R. 1905, the Energy and Water Appropriations bill, was floated which provided for the wholesale transfer of title to the project. At the Department's objection, no amendment to H.R. 1905 was offered at that time. While the language in this proposal has undergone changes since it was first conceptualized this summer, and is now limited to the transfer of operation and maintenance of facilities, our concerns remain the same. Among the Department's concerns are:

(1) The proposed legislation may constitute a taking of tribal property rights because the transfer of the project's operation and maintenance allows for the control of the water resource to which the Tribes have reserved water and fishing rights, which are vital to all reservation residents and the reservation environment;

(2) The proposed legislation makes no assurances that the outstanding federal capital expenditure of approximately $4.5 million would be repaid to the federal taxpayer;

(3) the proposed legislation does not clearly require the non-Indian irrigators to assume responsibility for their share of safety of dams costs;

(4) the proposed legislation would disrupt the existing administration of the power system on the reservation which is currently under 638 contract to the Tribes;

(5) The proposed legislation would interfere with and disrupt on-going water rights negotiations between the Tribes, the State of Montana, and the federal government;

(6) The proposed legislation implicitly and impermissibly transfers federal trust functions and responsibilities to non-federal entities.

The reasons behind our objections are set forth below.

Mr. Chairman, current federal law already provides a mechanism for the transfer or "turnover" of portions of this irrigation project to the non-Indian irrigators, **once federal capital expenditures for the project are fully recouped** (emphasis added). The required payment to the federal treasury has not yet occurred. Even if the non-Indian irrigators fully repay the federal treasury, existing law only provides that the management and operation of the irrigation works would be turned over. S. 1186 expressly provides for transfer of the power division as well as the irrigation works and constitutes an undue windfall to the irrigation districts.

The Department is concerned that turning over control of this project to the non-Indian irrigators will compromise the interests of other project beneficiaries. The turnover issue, and other

companion issues have been extensively litigated with the federal courts consistently finding that the required repayment has not yet occurred and that federal law does not require turnover of the power division. Moreover, the federal courts have also consistently upheld the Department's authority to operate the project in a manner which maintains minimum instream flows and lake levels necessary to protect the Confederated Salish and Kootenai Tribes' treaty fishing rights. Although existing law provides that turnover of management and operation of the irrigation project would occur subject to rules and regulations acceptable to the Secretary of the Interior, S. 1186 provides no such protection for tribal resources. Through this proposed legislation, the non-Indian irrigators are attempting to get that which the federal courts have consistently rejected. The contentious and continued litigation surrounding turnover and minimum instream flow requirements for project operations since 1985 demonstrates that the non-Indian irrigators are not willing to recognize the tribes' treaty property interests nor their debt to the federal taxpayer. Moreover, operation of the project in a manner that does not protect the Tribes' treaty reserved fishery and other resources could create substantial legal exposure to the United States. S. 1186 should not be passed.

The text of S. 1186 is silent on continued repayment of approximately $4.5 million dollars to the Treasury for capital expenditures. There is no express guarantee that if the project's operation and maintenance were turned over that the required payments to the federal treasury will continue. Since 1948, these capital expenditures have been subsidized by the receipts from the power division of the project. The non-Indian irrigators, having the project's capital expenditures underwritten by the power consumers on the Reservation, should not now be handed a further windfall.

There is an additional matter that should be of great fiscal

concern--the current Safety of Dams work that is on-going on the Flathead Indian Irrigation Project. To date, approximately $21 million has been spent on dam safety expenditures. It is anticipated that the eventual cost to repair and rehabilitate project dams could run into the tens of millions of dollars. Under the proposed legislation, the irrigation districts would not assume any liability or responsibility of repaying any of the dam safety costs--yet another windfall. These safety of dams costs are currently completely non-reimbursable because of the Project's's status as an Indian irrigation project (P.L. 103-302), resulting in an enormous benefit to the non-Indian irrigators.

Mr. Chairman, since 1988, the power division of the irrigation project has been operated by the tribes under a 638 contract. The tribes have operated the power division on a sound footing, and are responsible to the local community, having created a consumer advisory council which provides advice to the tribes on power policy. The consumer advisory council includes both Indian and non-Indian members. The proposed legislation would disrupt this existing system and would render the successful administration of the power division a nullity. In addition, the management and operation of the project has improved owing to the cooperative management structure developed by the Bureau of Indian Affairs, the Tribes, and the non-Indian irrigators. It seems disingenuous to now request the disruption of such a cooperative management effort in order to provide additional advantages for the non-Indian community.

Because the federal courts have consistently upheld the Department's operation of the project in a manner consistent with its trust duty to protect tribal fisheries, the turnover of the operation and maintenance of the project impermissibly transfers these authorities to a non-federal party. Not only is this unwise from a policy standpoint, it is problematic because the non-Indian irrigation community has not shown any interest in respecting the

Tribe's reserved water rights nor treaty fishing rights. The trust function cannot be transferred as a matter of law.

Finally, we do not believe it would be wise to turn over the irrigation project at this time because of on-going water rights negotiations with the state of Montana as part the state's general stream adjudication. I anticipate that these discussions could be on-going for the next two years, and that these discussions are sure to involve the use, management and operation of the irrigation facilities, river and stream management, and associated power production and infrastructure. It would be far preferable to (1) allow existing federal legal requirements for capital expenditure repayment and turnover to continue on course, (2) to support the settlement discussions and let a settlement emerge and (3) allow the parties to a settlement agreement--the State, the Tribes and the United States--determine the final disposition of project management.

For the reasons described, the Department strongly opposes S. 1186. The proposed legislation is untimely, fiscally unwise and could prevent the fair and equitable settlement of the tribe's reserved water rights. In addition, the precedent set by this legislation is unacceptable from a policy and legal standpoint.

This concludes my statement. I will be pleased to respond to any questions you may have.